IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 285.

WILLIAM J. GIVENS, *Appellant*,

vs.

FRED G. ZERBST, Warden, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

APPELLANT'S BRIEF.

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BRIEF FOR THE APPELLANT.

The appeal in this case is from a finding that the court-martial which tried and convicted the appellant, William J. Givens, was legally constituted, had jurisdiction of the person and the crime for which he was tried, and that the confinement awarded under said trial was conformable to law; all four of which propositions were denied by his petition for *habeas corpus*. This appeal seeks a reversal of said judgment, to the end that he go free.

STATEMENT OF THE CASE.

The appellant filed his petition for *habeas corpus*, in the District Court of the United States for the Northern District of Georgia, on December 15, 1919, seeking his discharge from custody of the Warden of the Atlanta Penitentiary, under a ten (10) year sentence, beginning May 2, 1919, pronounced against him by court-martial on November 19, 1918. His petition alleged in substance:

1. That the court-martial was not legally appointed.
2. That no jurisdiction was shown over the person.
3. That the court-martial had no jurisdiction over the crime.
4. That the confinement was unlawful.

That in consequence of the illegal trial and confinement, petitioner was deprived of his liberty, in violation of the Constitution and laws of the United States. (Record p.p. 1, 2, 3, and 6.)

The petition contained six paragraphs, and by leave of court was twice amended. The fifth paragraph, as so amended, contains the substantial allegations on which the right to be discharged from custody is based, and in its entirety, is as follows:—

> "That the said sentence, and confinement thereunder, are illegal and void, for the reasons, among others, (1) that the record of said trial does not show that at the time of the commission of the crime in question your petitioner was an officer in the United States Army, as alleged against him, nor that he was in any manner amenable to trial by court-martial; (2) that said court-martial had no authority to hear and determine the said charge of murder, or the specification thereunder, as alleged against your petitioner, (a) because there was a time of peace in the United States when the crime in question was committed, (b) because the pleadings did not negative a time of peace;

(3) that said sentence, as so confirmed and promulgated did not include confinement in the United States Penitentiary at Atlanta, Georgia, or at any other place, and (4) because the said court-martial which tried the accused was not legally constituted; in that the officer who appointed the court-martial, was, as is disclosed (a) by the precept shown in the record, (b) by his action in reviewing said case, and (c) by the General Court Martial Order, No. 139, a part of amended paragraph (4) of the petition herein, promulgating the sentence in this case, a Camp Commander, and, as such, had no authority under the Articles of War covering the appointment of courts-martial, to appoint other than a special court-martial." (Record, p.p. 3 & 6.)

The sequence of these four propositions, when referred to hereinafter, will be changed, so as to begin with the appointment of the court, and end with the confinement, thus following the arrangement adopted by the lower court in its opinion. (Rec. p. 27.)

The Charge was brought under the 92nd Article of War, *post*, V(a), and the accused pleaded "Not Guilty," to the following Specification thereunder:

> "In that Capt. William J. Givens, Inf., U. S. A., did, at or near Camp Sevier, S. C., on or about the 28th day of Sept., 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pvt. Will McLurkin, 3rd Prov. Dev. Reg., a human being, by shooting him with a revolver." (Rec. p.p. 4, 11, & 25.)

The verdict was, substantially: Not guilty of murder, but guilty of manslaughter. (Rec. p.p. 5, 11, & 25), and the sentence was that he be dismissed from the ser-

vice and confined, *in a place to be designated by the reviewing authority*, for a term of ten (10) years. (Rec. p.p. 5, 12 & 26); which was confirmed by the appointing authority, Brigadier General F. H. French (a camp Commander), *without naming a place of confinement*, as follows:

> "Headquarters, Camp Sevier, S. C.,
> Dec. 6, 1918.
> "To the Adjutant General of the Army,
> Washington, D. C.
> "In the foregoing case of Captain William J. Givens, Inf., the sentence is approved and the record of trial is forwarded for action under the 48th Article of War." (Rec. p. 20.)

On March 26, 1919, the record of trial was transmitted to the President, by the Acting Secretary of War, with a concurrence by him in the *recommendation* of the Judge Advocate General, that (1) the sentence be confirmed, and (2) that the Atlanta Prison "*be* designated" as a place of confinement. (Rec. p.p. 20 & 21.) On April 14, 1919, the President, then in Europe, by his own act, confirmed the sentence *without naming a place of confinement*, as follows:

> "In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution." (Rec. p. 21.)

On April 29, 1919, "Kerr," who we afterwards learn (Rec. p. 22), was acting Adjutant General (not Secretary of War), "designated" the Atlanta Prison as a place of confinement (Rec. p.p. 10, 11, & 18); and on the same date, the sentence, as so confirmed, was promulgated in orders by the War Department, *without showing the place of confinement* (Rec. p.p. 4, 11, & 25); and on April 30, 1919, the sentence as so promulgated, was read to Captain Givens, at Camp Jackson, S. C. (Rec. p. 18.)

The writ issued January 8, 1920. On January 24, 1920, the Court heard argument on the petition, and response filed that date; and, on February 2, 1920, filed an opinion, discharging the writ theretofore granted, and remanded the petitioner to the custody of the Warden, where he now is. (Rec. p.p. 27, 28, 29 & 30.)

Ex Parte Givens, 262 Fed. Rep., 702.

I.

ASSIGNMENTS OF ERROR.

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned and in discharging the writ of Habeas Corpus, and remanding him into custody of respondent. The court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

2. That the court-martial was not legally constituted.

3. That the record as made and authenticated did not show that petitioner was amenable to trial by military court.

4. That there was no authority to try accused for murder committed in the United States during the World War; and even if there was such authority, the pleadings as made did not show such authority.

5. That the confinement of petitioner is unlawful; not carried out in accordance with the findings of the court-martial.

6. That the court erred in permitting the introduction of evidence to supplement the record as so made and authenticated.

7. The court erred in dismissing the petition for

habeas corpus, discharging the writ, remanding appellant into the custody of respondent.

Record p. 32.

II.

GENERAL PROPOSITIONS OF LAW AND PROCEDURE INVOLVED.

(a.)

The disciplinary law controlling the Army is found, primarily, in the Manual for Courts-Martial (Ed. 1917). This volume contains all the rules and regulations of the service, covering the status of a soldier when in trouble.

Court-martial jurisdiction is an extraordinary authority created by statute, and is in flat derogation of the common law. This Manual is a codification of all these enactments conferring such unusual powers. Many of its provisions are in direct opposition to the principles of law and procedure applied in the civil courts. Whether or not these provisions seem, or may be, harsh, they are the law of the Army, and all men in the service are presumed to know them; and whether or not they know them or understand them, they are governed by them, and must abide by them, when applied by a court-martial.

Many of these rules seem, and are, arbitrary. Under them, a man's liberty may be bartered away, or his life, even, sacrificed, under circumstances which would not be tolerated in the Civil Courts. Virtually, and oftentimes, actually, in chains; before a court made up of men of superior rank, whom, in spite of everything, he must respect, yes, almost fear; with counsel, if he have any, generally of another's choosing, and, too often, like himself, too timid to make a proper defense, if he know one; an offender against the military code is frequently put in a precarious position for a minor offense. In con-

sequence, it is easy to see why the Civil Courts, when appealed to in actions like the present, have uniformly held the military tribunals to a strict exercise of their functions. To do otherwise would be unjust, and could only result in making it impossible to get worth-while young men into the service, except through compulsion.

As these rules bind a soldier, so do they protect him. They are at once his terror and his refuge, though more often the former. They are the outgrowth of more than a century of military jurisprudence, and embody the wisdom of some of the best legal talent the nation has produced.

A soldier when he takes the oath of allegiance, at the same time subscribes to these rules. What is written in this Manual, either in the Articles of War or the accompanying text, binds at once the government and the accused. The government cannot for its convenience, or for any other reason, ignore or abrogate any of these provisions, any more than an accused soldier may refuse to be bound thereby; both are bound; both are protected.

(b.)

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."

Ex Parte Yerger, 8 Wall., 95.

A court-martial is an inferior court, of special and limited powers, and there is no presumption in favor of its jurisdiction.

Davis Military Law (1915), 42, 139.
McClaughry vs. Deming, 186 U. S., 63.
Deming vs. McClaughry, 113 Fed. Rep., 651.
Brooks vs. Adams, *post*, 11 Pick (Mass.), 442.
Manual for Courts-Martial (1917), 17, Sec. 32.

"* * * * * one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record."

Op. Chief-Justice Marshall, Ex Parte Watkins, 3 Pet. 209.

"It is the settled law that courts-martial are courts of inferior and limited jurisdiction. No presumptions in favor of their exercise of jurisdiction are indulged. To give effect to their judgments imposed, it must be made to clearly and affirmatively appear that the court was legally constituted, that it had jurisdiction of the person and the offense charged, and that its judgment imposed is conformable to the law."

Hamilton vs. McClaughry, 136 Fed., 447.
Citing Dynes vs. Hoover, 20 How., 65.
And Runkle vs. U. S., 122 U. S., 543.

"In courts exercising a special jurisdiction, jurisdictional facts must appear, and, therefore, must be averred and proven, and there are no presumptions as to their jurisdiction over the subject matter, the person, or the property."

Godwin vs. State, 24 Del., 175.

"It is a rule of law, applying to all courts of special or limited jurisdiction, that their records shall show affirmatively, as to each case tried that the court acted with full jurisdiction not only as to the offense itself, but also as to the person of the offender."

Davis Military Law (1915), 96.

"Their judgments upon subjects within their limited jurisdiction, when duly approved or confirmed, are as legal and valid as those of any other tribunals. No appeal can be taken from them, nor can they be set aside, or reviewed by the courts of the United States, nor of any State, but United States courts may, on writ of habeas corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence, and will order him discharged if it appears to the satisfaction of the court that any of the statutory requirements conferring jurisdiction have not been fulfilled."

Manual for Courts-martial (1917), Sec. 33.

"The general finding of the military court that the petitioner was in the military service of the United States can be no bar to an inquiry into a jurisdictional fact. Otherwise, the findings of military tribunals in respect to all jurisdictional questions would be a bar to any proceedings on the part of the civil court."

In Re Grimley, 38 Fed. Rep., 85.

"A court-martial is a court of limited and special jurisdiction, * * * * * *. The law will intend nothing in its favor. He who seeks to enforce its sentences or to justify under its judgments, must set forth affirmatively and clearly all facts necessary to show that it was legally constituted and had jurisdiction."

Brooks vs. Adams, 11 Pick (Mass.), 442.

"Courts-martial, as has been seen, are courts of limited jurisdiction, and as such their records must show affirmatively that they have authority to hear and determine cases coming before them for trial."

* * * * * * * * * * *

"Being a court of special and limited jurisdiction, a court-martial has only statutory powers, * * * * * *. No presumption can be made in favor of its jurisdiction."

Davis Military Law, 42, 139.

"In order, therefore, that a particular court-martial trial may be valid, the following conditions must be fulfilled: (1) the court must have been properly constituted; (2) the accused must be subject to its jurisdiction; and (3) the crime for which he is tried must be a military offense. A defect in any one of these particulars will be fatal to the jurisdiction. An objection going to a want of jurisdiction cannot be waived by the accused, for criminal courts derive their power to try cases from formally enacted statutes, and can never acquire jurisdiction by the mere consent of the accused, as expressed in his waiver of a well-grounded objection to its jurisdiction."

Davis Military Law, 96-7.

"When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise * * * *."

"Persons, then, belonging to the Army and Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void; not voidable, but void; and civil courts have never failed, upon a proper suit to give a party redress. * * *."

Dynes vs. Hoover, 20 How., 81.

"When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken ruling in respect to evidence or law, but a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."

Manual for Courts-Martial, 19.
Dynes vs. Hoover, 20 How., 81.

"A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. It was said by Mr. Chief-Justice Waite, in Runkle vs. United States, 122 U. S., 543, 555, 30 L. ed. 1167, 1170, 7 Sup. Ct. Rep. 1141, 1146:

" 'A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. Sec. 470; Brooks vs. Adams, 11 Pick, 441, 442; Mills vs. Martin, 19 Johns. 7, 30; Duffield vs. Smith, 3

Serg & R. 590, 599. Such, also, is the effect of the decision of this court in Wise vs. Withers, 3 Cranch, 331, 2 L. ed. 457, which, according to the interpretation given it by Chief-Justice Marshall in Ex Parte Watkins, 3 Pet. 193, 209, 7 Law ed. 650, 655, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. Dynes vs. Hoover, 20 How., 65, 80, 15 L. ed. 838, 844; Mills vs. Martin, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief-Justice Marshall in Brown vs. Keene, 8 Pet. 112, 115, 8 L. ed. 885, 886, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive,—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments'." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

McClaughry vs. Deming, 186 U. S., 62-3.

We have quoted extensively from this case (McClaughry vs. Deming), for the reason that in some of the prior cases, notably Fletcher's Case, 148 U. S., and In Re Chapman, 166 U. S., one of the principles laid down in Runkles Case, here cited, has been *distinguished* and *criticised*, but those herein set out have stood the test of all the courts, without change.

> " * * * * * * * the tribunal erected to execute these laws was an inferior tribunal, proceeding by force of particular statutes out of the course of the common law; it was a jurisdiction limited by the statute, both as to the nature of the offense and the description of the persons over whom it should have cognizance. Everything ought to have been stated in the proceedings which was necessary to give the court jurisdiction, and to justify the judgment * * *. If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is that the court had not jurisdiction, and the cause was coram non judice; in which case no valid judgment could be rendered."

Ex Parte Watkins, 3 Pet., 204.

Citing Kempe vs. Kennedy, 5 Cranch 184-5.

III.

COURT-MARTIAL NOT LEGALLY APPOINTED.

> "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."

McClaughry vs. Deming, 186 U. S., 62.

This court-martial was appointed by Brigadier General F. H. French, the commanding officer at Camp Sevier. Under the Articles of War he had no authority to appoint a General Court-Martial, which this was. At the hearing on this petition there was offered in evidence War Department General Order No. 56, of June 13, 1918, as a cure for the (admitted) defect in the appointing order. Casual reading of this General Order discloses that it did not cover *all* troops stationed in Camp Sevier, or who might be found there; only those serving there and who were not of a tactical division stationed there were amenable to its provisions. Furthermore, the right to authorize such appointment as is provided in said General Order is questioned. This reason is, therefore, divisible into four part, to wit:

(a) The appointment on its face is defective.

(b) Is General Order 56 proper to be considered; i. e., can the court-martial record be supplemented by evidence aliunde?

(c) Is this General Order, if proper to be considered, competent under pleadings?

(d) Has the President power to authorize a Camp Commander to appoint general courts-martial?

(a.)

The Appointment on its Face is Defective.

The petition filed herein alleges, and the promulgated sentence shows, that the court-martial which tried the appellant for murder was a general court-martial, appointed by a Camp Commander. Authority to appoint such a court is found in Article of War 8, which does not include Camp Commanders; these latter being, under the express provisions of the next following Article of War (9), competent only to appoint special courts-martial, which latter court could not, under Article of War 13, try an officer. It was alleged—though not proven—that

petitioner was, if anything in the service, a Captain of Infantry. On its face, then, the record is deficient.

> "To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted."
>
> McClaughry vs. Deming, 186 U. S., 63.
>
> "If the jurisdiction does not appear on the face of the proceedings, the presumption of law is that the court has not jurisdiction."
>
> Ex Parte Watkins, 3 Pet. 204.

(b.)

Is General Order 56 Proper to be Considered; i. e., Can the Court-Martial Record be Supplemented by Evidence Aliunde?

The petition denies the sufficiency of the record. The response brought into the case, for the first time, this General Order (56). The mere introduction of this order is proof that it was necessary to the success of the respondent's contention, else why this effort to bolster up the case? Plainly, without it, the writ would have been sustained. Where the response admits the restraint, the burden is on the respondent to show his right to retain the custody of the petitioner. (Hamilton's Case 136 Fed., 447.)

This is a pure question of jurisdiction. If this order is not proper to be considered, this appeal must, on this point, prevail, and the petitioner be given his liberty. Courts-martial are vested with extraordinary powers:—and because of their unusual jurisdiction are held to a strict exercise of their functions. Nothing is "presumed" in their favor, everything must "affirmatively" appear. Their rights are purely statutory in direct derogation of man's common law rights, and being so, they must be, and are, strictly construed, and this is but simple justice.

Davis Military Law, *ante*, 96, 139.
Dynes vs. Hoover, 20 How., 81.

"It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is, jurisdiction. That being established, the habeas corpus must be denied, and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged."

In Re Grimley, 137 U. S., 150.

The general rule in regard to courts of limited and special jurisdiction, such as courts-martial, is stated in Grignon's Lessee vs. Astor, et al, 2 How. 319, as follows:

"The true line of distinction between courts whose decisions are conclusive if not removed to appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the *facts* and *evidence* which are necessary to *sustain* it; whose decision is not

evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities."

The general rule is again stated by this Court in Galpin vs. Page, 18 Wall., 350, as follows:

> "In proceedings had under special statutory authority, where the special powers conferred are exercised in a special manner, not according to the sources of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon their record."

In CYC, Vol. 11, p. 696, the rule is laid down, as follows:

> "Where the statute confers special authority not within the general jurisdiction of the court, to be exercised not according to the course of the common law, sufficient matter must appear of record or on the face of the proceedings to show the case to be within such special jurisdiction. * * * * A court of special, limited or inferior jurisdiction must by its record show all essential or vital jurisdictional facts of its authority to act in the particular case, and in what respect it has jurisdiction. This rule also applies to jurisdiction over special statutory proceedings in derogation of, or not according to, the course of the common law. So

the necessary jurisdictional facts must affirmatively appear by averment and proof to bring the case within the jurisdiction of such courts, etc." (Cyc. Vol. 11, 696.)

"General and special orders, general court-martial orders, and bulletins of the War Department and the headquarters of the several military departments may ordinarily be proved by printed official copies in the usual form. A court-martial will in general properly take judicial notice of the printed order as genuine and correct. A court-martial, however, should not in general accept in evidence, if objected, a printed or written order which has not been made public to the Army without some proof of its genuineness and official character."

Court-Martial Manual, p.p. 137-8.

Wood vs. N. W. Ins. Co., 46 N. Y., 421, *post*, V (b).

State vs. Main, 69 Conn., 123, *post* V (b).

"As it is a record of a court of special and limited jurisdiction, it seems conclusively settled its jurisdiction must affirmatively appear on the face of the record, and in the absence of such affirmative showing its judgment is a nullity.

* * * * * * * * * * *

"As from the record made by such a court, it must affirmatively disclose on its face the jurisdiction and power of the court, it follows, when the record made discloses want of jurisdiction in the court as composed, evidence *de hors* the record may not be admitted to supplement the same."

Op. Pollock, J. In Re Henkes, application for *habeas corpus*, in the District Court of the U. S. for the District of Kansas. Op. filed November, 1919.

This petition must stand or fall on what is contained in the court-martial record; this cannot be enlarged or diminished. Neither the petitioner, nor the government, can go outside the record, since any change in it, by or for either side, at the court's suggestion or with its approval, would be in the nature of a review of the case, and this court has ruled, repeatedly, that the civil courts have no right to correct the proceedings of a military tribunal. If this court cannot "correct," then, *a fortiori*, it cannot consider any new matter which might have direct bearing on the case, no matter how important it might seem. The following language of the Manual would seem to settle the point here made:

> "Will order him discharged if any of the statutory requirements conferring jurisdiction have not *been* fulfilled."
>
> Manual Courts-Martial 18, Sec. 33.
>
> "The facts necessary to show their jurisdiction and that their sentences are conformable to law must be stated positively."
>
> McClaughry vs. Deming, 186 U. S., 63.
>
> *See also:* Brooks vs. Adams, 1 Pick., 442.
>
> Runkle vs. U. S., 122 U. S., 556.
>
> Davis Military Law, 42, 139.

(c.)

Is General Order 56, if Proper to be Considered, Competent Under Findings?

If the Court should be of opinion that General Order 56 is proper to be considered, where in this record is it shown that this petitioner is in the "limited" class it covers, and is, therefore, amenable to its provisions? Section III of this order reads as follows:

> "By direction of the President, the commanding officer of each of the following camps is empowered under the 8th Article of War, to appoint general courts-martial whenever necessary:
>
> * * * * * * * * * * *
>
> "Camp Sevier, Greenville, S. C.
>
> * * * * * * * * * * *
>
> "The jurisdiction of commanding officers of camps under authority of this order shall be *limited* to persons subject to military law who are serving at camps commanded by them and who do not belong to tactical divisions serving thereat, except that the commanding General of a tactical division may in his discretion, direct members of his division against whom charges have been preferred to report or be turned over to the Commanding Officer of the camp at which his division is serving for trial by General Court Martial, transmitting to the Commanding Officer of the camp the charges and all papers in the case * * * * * * * *" (Rec. p. 13.)

The charge and specification in this case (Rec. p.p. 4, 11 & 25) do not enlighten us as to whether William J.

Givens was serving at Camp Sevier, or did not belong to a tactical division serving thereat. While effort has been made by the government to supply other missing links in this case, they have not attempted to show whether William J. Givens was even stationed at this camp, or whether, as might have been the case, he happened there on the night of the crime. So far as this record shows, all we know about William J. Givens is that he was alleged to be a Captain in the United States Army; station? Unknown.

> "When we speak of *proceedings* in a cause, * * * * * we do not mean mere irregularity in practice on the trial, * * * * * but a disregard of the essentials required by the statute under which the court has been convened * * * * *."
>
> Manual Courts-Martial, 19.
> Dynes vs. Hoover, 20 How., 81.

> "The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends."
>
> McClaughry vs. Deming, 186 U. S., 63.
> Runkle vs. U. S., 122 U. S., 555-6.

The right to authorize this appointment is not questioned because of the *manner* in which this General Order (56) was issued; the right of the Secretary of War to (so) act for the President is not denied. The questions here raised are based on statutory provisions. The right is claimed "under the 8th Article of War" (Rec. p. 13). The action is not taken by the President under his "inherent power" to *appoint* such courts (Swaim vs. U.

S., 165 U. S., 553), but is claimed, by express language, under this statute. No one denies the President's right to appoint such courts, *but that is not this case.*

> "Being a court of special and limited jurisdiction, a court-martial has only statutory powers, * * * * *. No presumption can be made in favor of its jurisdiction."
>
> Davis Military Law, 139.

Jurisdiction cannot be conferred on such a court by agrement, nor by the failure of the accused to raise the question by a plea in bar of trial.

> "An objection going to a want of jurisdiction cannot be waived by the accused, for criminal courts derive their power to try cases from formally enacted statutes, and can never acquire jurisdiction by the mere consent of the accused, as expressed in his waiver of a well-grounded objection to its jurisdiction."
>
> Davis Military Law, 96-7.

(d.)

Has the President Power to Authorize a Camp Commander to Appoint General Courts-Martial?

The President is acting under a delegated authority, and a strict observance of his right is required; it must be made clear that he has this right before it can be exercised. Whatever his right, it is conferred by statute, the 8th Article of War. Congress has by plain language (A. W. 9) given to Camp Commanders only the right to appoint special courts-martial. This respondent admits that the convening officer derived his authority, if he had any, from that part of the 8th Article of War, reading as follows:

> "When empowered by the President, the Commanding Officer of any district, or of any force or body of trops, may appoint *general* courts-martial."

The 9th Article of War provides that:

> "The Commanding Officer of a district, garrison, fort, camp, * * * * * may appoint *special* courts-martial."

Did Congress intend to enlarge the powers of a Camp Commander by this provision in Article of War 8 —here relied on—? We say it did not. It did, however. by express language, provide that a "district" commander might be authorized to appoint such higher courts. If it had intended to permit such camp commanders to exercise such enlarged powers "it would have been easy to say so." (Op. Rec. p. 29.)

The learned Judge (Op. Rec. p. 28) says:

> "The term 'district' has no technical military meaning, but includes the territory occupied by a permanent military camp such as Camp Sevier. Moreover, the troops at the camp are ordinarily under the command of its commanding officer, so that the President might authorize such officer to convene general courts-martial both as the commander of a district and of a body of troops." (Rec. p. 28.)

Whether "district" has or has not a technical meaning—and we think it has—Congress, by inclusion of the term along with others such as "garrison," "fort" and "camp," has shown that it is not the same as a camp. (A. W. 9.) There is no proof in this record—nor is it a fact—that Camp Sevier is a "permanent military camp." (Op. Rec. p. 28.) Nor will it suffice to say that "the troops

at the camp are ordinarily under the command of its commanding officer."

> "The authority to convene general courts-martial has been extended to include 'the commanding officer of any district, or of any force or body of troops' when empowered by the President, thus providing for the case of expeditionary forces not the equivalent of a brigade or higher unit, and other emergent services, and permitting general court-martial jurisdiction to be multiplied as the exigencies of the service may require. (Art. 8.)"
>
> Introduction Manual for Courts-Martial, p. xi, Sec. 5.

General French was a Brigadier General and his appropriate command was a Brigade. (Army Regulations 13.) Was this "force or body of troops" an "expeditionary force not the equavilent of a brigade or higher unit"? Certainly not. Was it "other emergent services"? Certainly not. There was no emergency at Camp Sevier. Everything was peaceful there. It is plain to see what was meant. Oftentimes, small detached forces are, as the word implies, separated from their bases, and it is necessary to provide for some higher authority to meet emergent situations as they arise in connection therewith. All the troops at Camp Sevier could have been disciplined without this order; that cannot be denied.

We have no doubt the President *intended* that such (Camp) commanders should be permitted to appoint such higher courts,—but that is not the question. Did *Congress* intend that such commanders should have the right to appoint such a court? Has Congress in this clause of Article of War 8—without using express words, enlarged the powers of Camp Commanders, which powers by ex-

press language, were *limited* by Article of War 9? We say it has not been shown by any manner of authority that Congress did so intend. If Congress did not so intend, then no such right existed, and General Order 56 can have no application to this case; even though it be found that it was offered in evidence at the proper time, and is sufficient, as set out in (c) herein.

> "Within the Runkle case * * * * * this particular Court was not legally constituted to perform the functions for which alone it was convened. It was therefore in law no court."
>
> McClaughry vs. Deming, 186 U. S., 65.

> "* * * but where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."
>
> Swaim vs. U. S., 165 U. S., 555.
> *Quoting* Keyes vs. U. S., 109 U. S., 336.
> *See also* Ex Parte Watkins, 3 Pet., 204, *supra*, end of II (b).

IV.

NO JURISDICTION SHOWN OVER PERSON OF ACCUSED.

> "If * * * * the facts essential to a valid exercise of the military power conferred by the 58th Article of War (A. W. 92, new code) * * * * * * * are not *shown*, the writ must go, and the petitioner granted his liberty."
>
> Hamilton vs. McClaughry, 136 Fed., 447-8.

At the trial of this case below, before the writ was issued, a preliminary hearing was had, and the court suggested that an amendment of the allegation as to jurisdiction over the person be made, so as to show that *as a fact* petitioner was not an officer in the United States Army. This we declined to do.

The question before the court is not whether William J. Givens was, *in fact*, amenable to military law. The question here is, was it *proven* that he was so amenable. It might have been a fact that he was so amenable, yet if not shown in the record of this inferior court, then this court-martial did not, in contemplation of law, have jurisdiction.

He was not, and could not have been, called upon to deny that the court-martial had jurisdiction over his person, (if it was a *fact* that it did not); he was not compelled to raise this question by a plea in bar of trial (Davis M. L., 96-7).

If it is not true, as alleged under oath in the petition for the writ, that the court-martial failed to show jurisdiction over the person of the accused, the respondent had the means—was able—and *it was his legal duty*, as was done in the McClaughry Case (186 U. S., 553), to produce the original record of trial, as made and authenticated by the President of the Court and the Trial Judge Advocate, to rebut this attack on its sufficiency. It would have been otherwise, had this court-martial record been the child of a tribunal of unlimited powers.

The "evidence" offered below (and we dispute both its competency and sufficiency) on this point means something. (Rec. p.p. 18, 19.) Why was it offered? Though not competent at this late date to be introduced, nor sufficient, if now considered by the court, this court can consider the reason for offering it. This reason is obvious.

The same burden that was on the government in the trial at Camp Sevier is on the respondent now, he having admitted by his answer the restraint and tried to justify under said court-martial proceeding. If this proceeding was bad then, it is bad now; all the infirmities of that record—if there are any—became the inheritance of this respondent, when he filed that answer; his burdens grew heavier, while those of the petitioner, if he ever had any, remained in *statu quo.*

> "So jealous are all English speaking nations of the liberty of their subjects, where a respondent in habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue and the person restrained have his liberty. It follows, therefore, notwithstanding the judgment of conviction by the military court set forth in the return of the respondent and admitted by the petitioner, if * * * * the facts essentional to a valid exercise of the military power conferred by the 58th Article of War * * * * are not *shown,* the writ must go, and the petitioner granted his liberty."
>
> Hamilton vs. McClaughry, 136 Fed., 447-8.

> "Everything ought to have been stated in the procedings which was necessary to give the court jurisdiction, and to justify the judgment."
>
> Ex Parte Watkins, 3 Pet., 204.

If the court should consider the "evidence" offered by the respondent (and it is subject to the same objection

shown in III (b) herein); what does this show? It shows that he accepted his commission on the 27th of September; the crime, as alleged, was committed "on or about the 28th" of the same month (Rec. p.p. 4, 11, 25). This record is silent on just when the crime was committed. Could it not have been committed on the 27th? Was it before the acceptance? The time of the commission of the crime, not the date of the trial, determines amenability, *vel non.*

The record does not disclose that he enjoyed any of the privileges of such office, nor that he had drawn any pay on the night of the murder, *or at any other time* (Rec. p. 29). Nor does it show that he *ever* took the oath of allegiance. The offer of this "evidence" is a bald admission that the allegation of the petition is true, and even if what they offer is competent, it is manifestly insufficient to cure these admitted ills of this court-martial record; since it fails to show the "pivotal fact" which, if introduced at the proper time, might have put life into an otherwise dead corpse.

> "The taking of the oath of allegiance is the pivotal fact which changes the status from that of a civilian to that of soldier."
>
> * * * * * * * * * * * *
>
> "By enlistment the citizen becomes a soldier. He acquires a new status * * * *. He cannot of his own volition throw off the garments he has once put on * * *."

In Re Grimley, 137 U. S., 152-6-7.

This court ruled that Grimley was in the service and could not get out because he had taken the oath of allegiance.

> "In order to become amenable to the military jurisdiction, an officer or soldier must have been legally and fully admitted

into the military service of the United States."

Davis Military Law, 99, 349.

"Every officer before he enters on the duties of his office, subscribes to these Articles (of War) and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them."

Carter vs. McClaughry, 183 U. S., 380.

Has it been shown that William J. Givens "subscribed" to these Articles of War?

"It was a jurisdiction limited by the statute both as to the nature of the offense, and the description of the persons over whom it should have cognizance."

Ex Parte Watkins, *supra.*

"If the facts essential to a valid exercise of the military power are not *shown* the writ must go, and the petitioner granted his liberty."

Hamilton vs. McClaughry, 136 Fed., 448.

See also Grignon's Case, *supra,* III (b).

Requiring affirmative showing before a court-martial of the status of the accused may be novel, and, no doubt, to the military, startling, but it would seem to be, nevertheless, good, sound law, when applied to a controversy pending in such "inferior" court.

"And it is not enough to plead all this, but it must be proven by whomever would defend them. All this is familiar and settled law."

Ex Parte Beck, 245 Fed., 967.

Following McClaughry vs. Deming, 186, U. S.

"It is important that the oath should not be omitted, for the reason that the oath, as taken and subscribed by the party, constitutes the regular, and in some cases the only legal, written evidence that the personal act of enlisting has been completed by him."

Davis Military Law, 249, note.

Ibid, p. 99, *supra*.

If it be true, as alleged in the specification, that he was a Captain in the United States Army, it could have been shown; it should have been shown; and must have been shown, before he could properly be convicted by this court which tried him. This is not a question of improper admission of evidence, but a total failure to show a jurisdictional fact. The "general finding' is not sufficient.

See In Re Grimley, 38 Fed., 85, *supra* II (b).

Also Grignon's Case, *supra*.

Therefore, until and unless it appear, affirmatively, that he took the oath of allegiance (or at least that the court-martial formally found that he was in the service), he was not, insofar as this case is concerned, a soldier, and, if not (shown to be) a soldier, he was not amenable to military law.

V.

NO JURISDICTION OVER CRIME.

(a) A time of peace in the United States when crime was committed.

(b) Pleadings do not negative peace.

(a.)

A Time of Peace in the United States when Crime was Committed.

> "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."
>
> Article of War 92.

To the average lay mind, to argue that in time of war we are at peace, seems paradoxical, if not ridiculous; while to the uninitiated professional brother, it seems to be the drowning man grasping at the straw; a desperate defense,—not to say expedient,—empty of hope of success, and doomed to failure.

We must not, however, lose sight of the fact that we are living in a "free" country; that a man's liberty is at stake, and that the trial had was by virtue of a statute in derogation of rights which antedate its enactment, are more ancient than the legislature which framed it, and which had their beginnings in the early dawn of judicial history.

The statute (A. W. 92) under which William J. Givens was tried for murder is the successor of Article of War 58 (old code), which was enacted during the Civil War (March 3, 1863), in the midst of a terrible necessity,

while the clash of arms was going on; to aid the civil authorities in supporting the law, where war "raged,"—and, because of which war, the civil courts were dethroned and unable to perform their functions.

In this act of March 3, 1863, is found the first authority for a trial by court-martial of the crime of murder; prior thereto the trial of this and the other more serious crimes was left exclusively to the civil courts.

> "That in time of war, insurrection and rebellion, murder, assault * * * * * burglary, rape * * * * * shall be punishable by the sentence of general courts-martial or military commissions, when committed by persons who are in the military service of the United States, and subject to the Articles of War."
>
> 12 Statutes at Large, 736.

> "But the section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the State courts. It simply declares that the offenses shall be "punishable," not that they shall be punished by the military courts; and this is merely saying that they may be thus punished."
>
> "Previous to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of

justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect."

"* * * * *. No public policy would have been subserved by investing them with such jurisdiction, and many reasons may be suggested against it."

Coleman vs. Tenn., 97 U. S., 513-4.

"The Constitution of the United States, like those of the several States, recognizes, as a fundamental principle, that such military jurisdiction as is created by its authority is to be exercised in strict sub-ordination to the civil power."

Davis Military Law, p. 456.
Citing Dow vs. Johnson, *post*.

"We fully agree with the presiding Justice of the Circuit Court, in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield."

Dow vs. Johnson, 100 U. S., 169.

When this case was argued below, but two cases of importance bearing on this statute, to wit: Ex Parte Milligan, 4 Wall. and Coleman's Case, 97 U. S., had been decided by this Court; in neither of which was the direct question here contended for raised. But notwithstanding this latter fact, this Court, in both these cases, interpreted this law generally, and outlined most clearly its views on

what Congress could and did intend when it enacted this legislation.

What did Congress mean when it said in Article of War 92, that no person subject to military law should be tried by court-martial for murder committed "in time of peace?" Did Congress mean, that, because we might be at war with some enemy three thousand miles overseas, when all the courts of the State in which the crime was committed were open, a murder committed in such State should not be tried, *exclusively*, by the courts of that State? Suppose, for example, that we were technically at war with, say, the Republic of Andora, with less than two hundred square miles of territory, and a total population of six thousand souls; would all murders committed in the United Sates by persons subject to military law be triable by court-martial, because we happened to be at war with a handful of people thousands of miles away? If this be so, then our boasted free government would become a mockery, and justice would hang her head in shame. Possibly thousands, deprived of a great common law privilege, without the first semblance of necessity.

> "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress, in the absence of clear and direct language to that effect."
>
> Coleman vs. Tenn., *supra*.

There should, indeed, be a terrible necessity confronting us before the great majority of officers in our Army should be permitted to sit in judgment in a case of life or death.

> "We by no means assert that Congress can establish and apply the laws of war

where no war has been declared or exists. Where peace exists, the laws of peace must prevail."

Op. Mr. Chief-Justice Chase, Ex Parte Milligan, 4 Wall., 140.

"When the King's courts are opened, it is a time of peace, in judgment of law."

First Parliament Edw. III.
Ex Parte Milligan, 4 Wall., 128.

"When the law can act, every other method of punishing supposed crime is itself an enormous crime."

Ex Parte Milligan, 4 Wall., 128.

"When peace prevails, and the authority of the government is undisputed, there is no difficulty in preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise."

Ex Parte Milligan, 4 Wall., 123-4.

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."

Ex Parte Milligan, 4 Wall., 127.

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real; such as effectually closes the courts and deposes the civil administration."

Ex Parte Milligan, 4 Wall., 127.

"The main object of the Article (A. W. 58, *supra*) evidently was to provide for the punishment of the crimes of soldiers in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government."

Winthrop Abdgmt. Mil. Law (1899), 277.

There has been no invasion of the territory of the United States during the World War; the civil tribunals, State and Federal, have been always open; their regular proceedings have not been interrupted, and their processes have been regularly executed. These are facts of public notoriety and a part of the history of the country, of which the courts will take judicial notice. (Ex Parte Milligan.) If armies were collected here, they were to be employed in another locality, on another continent.

The whole history of court-martial jurisdiction shows the supremacy of the civil over the military authority.

In Article of War 57 (old code), Congress expressly stated that only during rebellion could a man be executed for violating its provisions in the United States. Thus they would not allow the death penalty to be imposed by court-martial, except the crime be committed within the

theatre of operations, or "in foreign parts." Why then, we ask, would it now mean to permit a military court to take jurisdiction of this capital crime, committed without the theatre of operations, especially when such crime (murder) was one which necessitated a far greater understanding of the law than that covered by Article of War 57? Instead of enlarging court-martial jurisdiction over these two crimes, Congress has limited their right over them to a more narrow sphere.

When Congress wanted to give a military court the right to inflict capital punishment for crime committed in the United States, it said so, plainly:—"during rebellion against the authority of the United States." By the same Article (A. W. 57, old code), there was no limitation touching crimes committed in "foreign parts," by those "belonging to the armies of the United States."

In the Act of 1916 (A. W. 92) we can easily discover the purpose of Congress to limit the jurisdiction over these two crimes to a time of actual warfare, insurrection or rebellion,—*flagrante bello,* as theretofore was the fact by express language of statute. Since the revision of 1874, the United States had become a world power; our armies were spreading out into "foreign parts," (A. W. 57, old code)—where, like in the United States, during "war, insurrection and rebellion" we had no civil courts, and it was necessary that some jurisdiction to cover these serious crimes follow our armies; and this is clearly shown in the Article in question, where unlimited jurisdiction is given to courts-martial over these two crimes, except when committed by soldiers in the United States or in the District of Columbia.

Indeed, it might be argued, that Congress, knowing the seriousness of these two crimes, as is shown by their inclusion, for the first time, in a separate Article; knowing the many and knotty propositions of law and fact which might be involved in their trial, and knowing the

antipathy of the American people to any interference by the military with civil jurisdiction, was reluctant, and properly so, to give to these *inferior* courts the right to sit in judgment in these *superior* cases, except when and where necessity compelled.

> "The Article (A. W. 58, old code) in investing general courts-martial with a special jurisdiction of certain crimes in time of war, by necessary implication excludes them from exercising jurisdiction over the same in time of peace, except insofar as they may be authorized to exercise it under other Articles."
>
> Winthrop Military Law, 2nd Ed. p.p. 1038-9.

> "It is to be noted that where the hostilities are confined to a particular State or States, or to any particular portion of the territory of the Republic, a court-martial will strictly, be authorized to exercise the jurisdiction conferred by the Article only in cases of crimes committed within the limited theatre of such hostilities, for it is 'time of war,' etc., only in such locality."
>
> Winthrop, p. 1038.

> "Origin and Object: This provision (A. W. 58), which, with but a single material change of language, is a republication of Sec. 30 of the Acts of Congress of March 3, 1863, c. 75, appeared first as an Article of War in the Revision of 1874. Prior to its enactment, courts-martial were not invested either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except when the same prejudiced 'good order and military discipline.' In 1863, however—during the late Civil War—a

provision incorporated in this Article, initiated in our military law the marked innovation of investing general courts-martial with jurisdiction, in time of war, etc., of the grave civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service. Its main object evidently was to provide for the punishment of these crimes in localities where in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government."

Winthrop, p.p. 1032-3.

Thus the law on this point stood on January 24th, so far as we were able to find it, and thus we urged it upon the lower court, but without success. On April 19th, however, this Court, as we believe, adopted our views on this question without reservation, and made certain that which theretofore was possibly open to argument, and this in a case which is so closely analogous to the present one, that the opinion, unlike those in the *Milligan* and *Coleman* cases, leaves no room for doubt about the soundness of our contention.

The Caldwell Case is too recent to require any but a general statement of his contention; which was:

That under the 92nd Article of War, courts-martial had exclusive jurisdiction over the crime of murder when committed during the World War by one amenable to military law, whether committed within the geographical limits of the United States or the District of Columbia, or elsehere.

By its opinion (April 19, 1920,) this Court not only denied Caldwell's contention, that, under said Article of

War (92), Congress meant that "by mere operation of a declaration of war, the States were completely stripped of authority to try" such (2) cases, but it went further and said:

> "Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of argument that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of State authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the subject for, as said in Coleman vs. Tennessee (97 U. S., 509, 514), 'With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.' Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775 were, as we have seen, in the very midst of the War for Independence modified in 1776 to make certain the preservation of the civil power."
>
> "As in 1866 it was settled in Ex Parte Milligan, 4 Wall., 2, that a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations gave no power to the military authorities where the civil courts were open and capable of performing their duties, to disregard their authority or to frustrate the exercise by them of their normal and legitimate jurisdiction, it is indeed

open to grave doubt whether it was the purpose of Congress, by the words 'except in time of war,' or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crime specified—a doubt which if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the State courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the revision of 1874 is considered, since in that revision the Act of 1863 was in terms re-enacted and the words 'except in time of war' appearing for the first time in Article 59 of that revision, could have been alone intended to qualify the time of war with which the Act dealt, that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts."

Caldwell vs. Parker (unreported),
Op. April 19, 1920, p.p. 5 & 6.

Winthrop Military Law (2nd Ed.),
Vol. II, p. 1033.

(b.)

Pleadings do Not Negative Peace.

If there was a time of war when and where this crime was committed, how does it appear in the record? The pleadings are silent on the subject.

Since it is not alleged, could the court judicially notice that there was a state of war; if there was?

"Judicial notice comes in place of proof and is generally to be exercised by a tribunal which has the power to pass upon the facts. This court will not take judicial notice of the existence of a fact which has not been found by the court below, nor upon which a finding has been refused."

Wood vs. N. W. Ins., Co., 46 N. Y., 421.

"Judicial notice takes the place of proof and is of equal force. * * * * * in its appropiate field it displaces evidence, as it stands for proof, it fulfills the object which evidence is designed to fulfill."

State vs. Main, 69 Conn., 123.

Precedents are found in the *Coleman* and *Milligan* cases. In the former, the averment of a time of war was (first) omitted from the pleadings, and an amendment was made in this particular after demurrer sustained (97 U. S., 511), and,

In the latter, the allegation was "at a period of war and armed rebellion against the authority of the United States." (4 Wall.)

(1) "The decisions of this Court require that averment of jurisdiction must be positive; (2) the facts necessary to show jurisdiction must be stated expressly in the declaration; (3) he who seeks to justify under a court-martial judgment must set forth all facts necessary to show jurisdiction; (4) jurisdictional facts must be averred and proven; (5) it is not enough to plead all this; (6) if facts essential to valid exercise of jurisdiction are not shown, writ must prevail; (7) everything ought to be stated on face of proceedings, to show jurisdiction, otherwise, presumption is that court had not jurisdiction, and

proceedings coram non judice; (8) jurisdictional facts must affirmatively appear, by averment and proof in proceedings exercised in derogation of or not according to the course of the common law."

1—Brown vs. Keene, 8 Pet., 112.
2—McClaughry vs. Deming, 186 U. S., 65.
3—Brooks vs. Adams, 11 Pick, 442.
4—Godwin vs. State, 24 Del., 173.
5—Ex Parte Beck, 245 Fed., 967.
6—Hamilton vs. McClaughry, 136 Fed., 448.
7—Ex Parte Watkins, 3 Pet., 204.
8—Cyc Vol. 11, p. 696; *supra*, III (b).

If the English language means anything; if the decisions of our courts have any weight, then we say, no court can judicially "know" that we were not in a time of peace in South Carolina in 1918, under the charge and specification herein set out; even if it should be (first) decided that there was a war *in this country.*

VI.

CONFINEMENT UNLAWFUL.

(a) Was place properly designated.
(b) Was case properly referred to President.
(c) Could the President act in Europe.

(a.)

Was Place Properly Designated?

The sentence in this case is two-fold: Dismissal *and* confinement; separate and distinct punishments; one might be remitted, and the other executed; or both remitted or executed. It is:

> "To be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for ten (10) years. (Rec. p.p. 5, 12 & 26.)

This sentence was imposed under the 93rd Article of War, which is as follows:

> "Any person subject to military law who commits manslaughter * * * * * shall be punished as a court martial may direct."

The appointing authority, on review, endorsed the record in the following language:

> "In the foregoing case of Captain William J. Givens, Inf., the sentence is approved and the record of trial is forwarded for action under the 48th Article of War." (Rec. p. 20.)

President Wilson, when he, in Europe, reviewed the record of trial, stated his pleasure, as follows:

> "In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed, and will be carried into execution." (Rec. p.p. 5, 12 & 26.)

The promulgation of the sentence, as so approved and confirmed, is silent as to the place of confinement.

> General Court-Martial Order No. 139, Rec. p.p. 5, 11 & 25.

If it be decided that the President was a legal reviewing authority, there is no dispute here made about the *dismissal*. That is, by direct language of the sentence, imposed, and the War Department Order (No. 139) properly carries it out. And it is a significant fact, that as to this (separate) sentence, this action was taken *"By order of the Secretary of War"* (Rec. p.p. 5, 12 & 26), which was not the case when the attempt to designate a place of confinement was made on the previous day.

This latter act was the act of "Kerr," who, we are afterwards told (Rec. p. 22) by the *Chief Clerk* to the Secretary of War, was the Acting Adjutant General.

Section 401 of the Court-Martial Manual, in part, reads:

> "Date of beginning of Sentence.—The order promulgating the proceedings of a court and the action of the reviewing authority will, when practicable, be of the same date. When this is not practicable, the order will give the date of the action of the reviewing authority which date will be the beginning of the sentence of confinement, as well where dishonorable discharge is imposed as where it is not."
>
> Court Martial Manual, p. 190.

If the contention of the government be correct, then we have the confinement in the penitentiary beginning fifteen days before the place was "designated" by the Acting Adjutant General, the President's action on the sentence having been taken on the 14th of April, and this designation having been made on the 29th of the same month.

Section 400 of the Manual, in part, says:

> "Trials by general courts-martial, including so much of the proceedings as will give the charges and specifications, the pleas, findings, and sentence, and the action and remarks of the reviewing authority will be announced in general orders issued from the War Department, or in general court-martial orders from the headquarters exercising general court-martial jurisdiction," (Manual p. 190)

and refers to Appendix 11 "for forms" promulgating such sentences.

In Appendix 11, Manual p. 376, we fined the following "form:"

> "The sentence is approved and will be duly executed. The United States Disciplinary Barracks is designated as the place of confinement."

This action is not taken by telegram from the chance acting head of a subordinate department of the government, but by formal order.

In Appendix 10 (Manual p. 372-12), "Forms for Original Action," the following is found:

> "Headquarters, ..., ..., 191.
> "In the foregoing case of.....the sentence is approved and will be duly executed. .....is designated as a place of confinement."

The action of the reviewing authority is both *judicial* and *ministerial*. He "decides" and "orders." (Davis M. L., p. 542.) The court-martial did not decide that William J. Givens should be confined in a penitentiary, nor did it say that the Acting Adjutant General should so decide.

> " • • • • • I think it is clear that the statute confers upon the Secretary of War a discretionary or judicial authority, and not a ministerial one, and that, within well settled rules of law, such authority cannot be delegated as here proposed • • •."

Opinions J. A. G. (1917), p. 26.

The appointing power, on review, must act in person (Manual Sec. 376, p. 183), and the reason is obvious.

He must so act, in order to be able, intelligently, to decide whether the findings of the court-martial are in accordance with law and military justice. The court-martial, presumably, knew this, and left it to the reviewing officer to say, after this personal review, whether the accused should be confined in a jail, a penitentiary, the Disciplinary Barracks, or, indeed, whether he should be confined at all.

No one will seriously contend that the Acting Adjutant General's act was other than a mere ministerial act, done in the usual course of business, and without the least understanding of the merits or demerits of the case.

"The personal signature of the President is not," under *Fletcher's* Case, "made essential by law; that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being deemed in law the act of the President whom he represents" (Davis M. L., p. 545). Here, however, the Secretary did not presume to act for the President. If he does so act, his *"personal signature"* as "the head of the department to which the subject belongs *shall* be" attached.

> A court-martial convened by the Secretary of War: *held* legally constituted; such act of the Secretary being administrative, and in law the act of the President whom he represents. The order here is not a judicial but an Executive act, and like any other Executive order, is legal, if made through the head of the Executive Department to the province of which it pertains."
>
> Op. J. A. G. (1912), III-B-1, p. 491-2.

The sentence in this case does not require—though it permits—confinement in a penitentiary. Under the law of South Carolina, which here applies, this is a misdemeanor. Military offenders have been confined in the Disciplinary Barracks for murder. A man's position in society demands that he be not placed in a penitentiary except upon a clear showing made of the right to put him there.

Whether in form right or wrong,—and it seems to be right—(Manual Sec. 394, p. 189), this court-martial judicially decided that the place should be pointed out by the reviewing authority, (and this means the *original* as well as the *final* reviewing authority); two judicial and ministerial duties, of equal importance, to wit: To approve, or disapprove the findings, and, if approved *in toto,* to name the place of confinement. (*Supra,* forms, Appendices 10 and 11, Manual, p.p. 372-6.)

> "The Reviewing Authority.—This term is employed in military parlance to designate the officer whose province and duty it is to take action upon—approve or disapprove, etc.—the proceedings of a court-martial after the same are terminated, and when the record is transmitted to him for such action. This officer is ordinarily the commander who has convened the court. * * * * * * * *.
>
> "In cases, however, of cases of dismissal and of death imposed in time of peace, and of some death sentences adjudged in time of war, as also of all sentences 'respecting general officers,' while the convening officer (or his successor) is the *original* reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is prescribed by Articles 105, 106, 108 and 109 (old code), that the sentence shall not be executed without the confirmation of the President, the latter becomes in

> these cases the *final* reviewing officer, when, the sentence having been approved by the commander * * * * * * *."
>
> Davis Military Law, p.p. 537-8.
> *See also* Introduction to Manual, Sec. 4, p. xi.

General French did not point out a place. The President did not do so. The Secretary of War did not. The Acting Adjutant General did. Prior to *Fletcher's* Case (148 U. S., 84) the President had to act in person, as decided in *Runkle's* Case (122 U. S., 543). In the present case, the Secretary did not presume to act; all he did was to concur in the "recommendation" of the Judge Advocate General that the penitentiary "be"—not is— designated (Rec. p. 21). The only sentence existing at the time the papers reached the President was the dismissal. And he did not, in any event, war or no war, have to act on the case, so far as this *confinement* was concerned. (A. W. 48.)

The Judge Advocate General has ruled (Davis Military Law, p. 540) that a mere recommendation that the proceedings be approved is not an approval.

Digest J. A. G., 126, par. 2.

The failure of the President and General French (if, indeed, it was a failure, in the sense of an oversight) to designate a place of confinement as required by the sentence of the court, amounts, in law, to a refusal to confirm the sentence *in toto,* and as a constructive remission of that part of it as relates to confinement, leaving the other part, the dismissal from the service, to be executed.

Davis Military Law, p. 551, note.

It is within reason to suppose that they did this deliberately, since it is presumed that they personally examined the proceedings, and a casual reading of the

record will satisfy most minds that the crime committed did not merit more severe punishment, since it was therein shown, and this out of the mouth of the prosecution, that he was drunk at the time the act was committed, had no motive, and was provoked to do it by some remark made by the deceased before he fired the fatal shot. The crime committed did not merit more severe punishment than dismissal.

This sentence, as thus reduced, was published in orders on April 29, 1919. After this no change could legally be made in the sentence, whether the remission of confinement was deliberate or accidental.

Manual, Sec. 387, p. 187; 394-5, p. 189; 400, 401, p. 190; App. X, 372-12.

"A typewritten copy of the General Order publishing the prisoner's sentence * * * * * accompanied him. A printed copy was afterwards received at the prison (Fort Leavenworth). The latter contained the printed notation: 'This order supersedes typewritten order publishing this case.' HELD: That the first order legally completed the action of the reviewing authority, and the subsequent order was null and void."

Digest Judge Advocate General's Opinions (1912-1917), 466.

"After a sentence is once unconditionally remitted, it cannot be renewed or revived. An order purporting to revoke the order promulgating the remission would be void and of no effect.

"A sentence to confinement with forfeiture of pay imposes two distinct and independent punishments. HELD: That the remission of the unexecuted portion of one would not affect the other."

Digest (1912), 840-841.
Ibid, 565, XIV E 9 e, f, g & g1.
Ibid, 569, XIV H 5.
Digest (1912-1917), 177.

"The action of a reviewing authority in approving a sentence of a general court-martial and simultaneously remitting a portion thereof is legally equivalent to approving only the sentence as reduced."
Digest (1912-1917), 8.

If the method adopted in this case to point out the place of confinement, be, as stated by the learned Judge below, the "uniform practice" (Rec. p. 30), we must either declare it unlawful or amend our Manual to conform to this new authority.

(b.)

Was the Case Properly Referred to the President?

When the time came to refer this case to the *final* reviewing authority, it is easy to see that the *original* reviewing authority found himself impaled on the horns of a dilemma. Here was a crime, committed before the Armistice; trial started before and finished after the Armistice; text writers saying all sorts of things about such a situation, and the 48th Article of War requiring that no officer should be dismissed the service in time of *peace* except upon confirmation of his sentence by the President. In this situation, General French chose to send the case to the President, rather than to the Department Commander, who, under this same Article is authorized, in time of *war*, to confirm such sentences.

"Both the legislative history of the 48th Article of War and its unambiguous language require the interpretation • • •

that dismissal of an officer below the grade of Brigadier General shall not be carried into effect until it is approved by the commanding General of the army in the field or by the commanding General of the territorial depart or division."

Op. J. A. G., Dec. 8, 1917.

When the sentence in this case was pronounced (November 19, 1918), and when the reference was made (December 6, 1918), war no longer "raged" in Europe, and the "clash of arms" there was but a terrible memory.

The decisions of the Judge Advocate General's Department are clear, to the effect that if a crime like this is committed during the existence of war, but trial is not had, or sentence imposed, or the record of trial reached the reviewing authority before peace is declared, court-martial jurisdiction does not attach, or is ousted, if already attached.

"While the termination of a state of war does not in general affect the jurisdiction of a court-martial over offenses committed during the war, there are yet special cases in which, by the express terms of a statute, or by implication from its language, the jurisdiction of such a court over certain offenses is restrictd to the period of war. Thus the 58th Article expressly makes the offenses therein enumerated punishable by sentence of general court-martial only in time of war, rebellion, etc., and if, in any case, the war which prevailed at the commission of the offense has ended before the same is actually brought to trial, the court will not be legally competent to take cognizance thereof under this Article."

Winthrop Military Law (1899), 35.

If it be decided, under V (a), that there was a war in this country, then this reference to the President was improper, and *no* final review has been had, and, the sentence having been promulgated, no change can be made, and the writ must be sustained and the petitioner have his liberty.

> "We are of the opinion that in all cases, where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case and to render judgment."
>
> * * * * * * * * *
>
> "and the law in prescribing the punishment, either as to the extent, or the mode, or *the place* of it, should be followed."

In Re Bonner, 151 U. S., 257-8.

(c.)

Could the President Act in Europe?

Did the President have the constitutional right to take action on this case while in Europe?

This question is at once novel and important. We submit it without argument.

VII.

CONCLUDING OBSERVATIONS.

We are not unmindful of the far-reaching effect the sustaining of this petition may have; but that cannot influence us in considering the present matter. A man's liberty is at stake.

If the government has made a fatal error, the petitioner is entitled to any benefit to be derived from it,

notwithstanding the fact that it may disclose like errors by other courts. *No amount of wrongs can make a right.*

This is the only court to which the petitioner can look for relief from a wrongful imprisonment. Military courts are, in effect, courts of original and final jurisdiction. No direct appeal to any other court can be had. If such a court makes a mistake; for example, omits to do an essential thing in the trial of a case (as we here contend), no court of appeals can correct that mistake, even though it may mean that a man, possible beyond its jurisdiction, may be deprived of his life or liberty thereby. Therefore, could there be a graver question before any court, than the one now before this court? A gentleman, deprived of his liberty, suffers more than a hardened criminal at the moment the executioner's trap is sprung.

Until these questions are raised, no difficulty arises; but once they are brought to the attention of the proper tribunal, they must be solved according to law; no matter what effect the proper solution of them may have on other cases in like situation. It cannot be said that public policy demands that such cases be not disturbed to the possible detriment of the reputations of certain officials. Public policy demands that the law be followed in any case, and more especially in a case where the hands of the accused are tied, as here, by having no appellate tribunal before which to seek full justice. Even a possible "general jail delivery over the whole United States," as argued below, will not deter the Court from doing its plain duty.

> "But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole peo-

ple must not be violated or set aside in order to inflict even upon the guilty, unauthorized though merited justice."

* * * * * * * * *

"If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings."

Ex Parte Milligan, 4 Wall., 119.

It is, therefore, respectfully submitted, that the judgment of the lower court should be reversed, and the case remanded, with direction to discharge the petitioner, and restore him to his former position in the Army.

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SUPPLEMENT.

ADDITIONAL AUTHORITIES IN GIVENS VS. ZERBST,

NO. 285.

October Term, 1920.

"The fundamental inquiry is whether the court-martial has jurisdiction, and this must appear affirmatively in the record of the proceedings before *that* court."

In Re Crain, 84 Fed. Rep., 789.

(Precept)

"[By virtue of the express authority vested in me by the President of the United States, in accordance with the provisions of Article 38, Section 1624, title 15, Chapter 10 of the Revised Statutes of the United States,] a general court-martial is hereby ordered to convene, etc."

"This (the above) allegation of the authority of Admiral Bunce to order a court-martial for the trial of the petitioner we deem sufficient. * * * * * we do not think it was necessary to attach to the record of the court-martial a copy of his commission from the president."

In Re Crain, fo. 790.

"It was unnecessary to set forth the orders of the President at large: it was quite sufficient to state that the call was in obedience to them."

Martin vs. Mott, 12 Wheaton, 33.

"Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make those facts a part of the complaint for the purpose of giving jurisdiction to a Federal Court, as the averments, if not sufficient in themselves to give

jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge."

Mountain View Co. vs. McFadden, 180 U. S., 534.

"Court cannot make the complainant's case other than it made it, by taking judicial notice of facts which it did not choose to rely on in its pleading."

State vs. Kansas Co., 183 U. S., 185.

"It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana, etc."

"We know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him."

Burke vs. Miltenberger (86 U. S.) 19 Wall, 519.

"If the court is uncertain as to the fact which it is *called upon* to notice judicially, it may refer to any person or to any document or book of reference to satisfy itself with regard thereto, or it may refuse to take judicial notice of the fact unless and until the party *calling upon it to do so* shall produce such document or book of reference."

Court Martial Manual, fo. 138.

"By the provisions of the Act of August 29, 1916 (38 A. W.): The President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, etc."

* * * * * * * * * * * * * * *

"The modes of proof, therefore * * * * are now, by express congressional enact-

ment, placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulations."

* * * * * * * * * * * * *

"Where the rule herein laid down is clear, it should be taken as law, * * * * * unless modified by Federal statute or some decision of the Federal Courts made since the date of the publication of the Manual."

Court Martial Manual, Secs. 198-9, p.p. 96-7.

"Section 3 of General Order No. 19, War Department, February 19, 1918, authorizes camp commanders to exercise general court martial jurisdiction in the case where the division commanders and their headquarters are moved from such camps and cantonments, leaving there other troops. Inasmuch as under this order a camp commander may only exercise general court-martial jurisdiction where certain conditions exist, it is *essential that the record affirmatively show* that the conditions prerequisite to the jurisdiction *do exist.*"

Dig. Ops., J. A. G., March 1918, p. 36.

"It is a general rule that a special jurisdictional fact outside the ordinary and intrinsic situation of the thing shall be specially averred in pleading, and certainly that which is contrary to the ordinary course of things should be averred, to give the court knowledge of the fact."

* * * * * * * * * * * * *

"Nor can the want of such averment or showing in the record as the supreme court demands be supplied by proof *aliunde* the record, offered at the trial of the subsequent suit predicated on the alleged judgment."

Henning vs. Planters Ins. Co., 28 Fed. Rep., 443.

"But this was not the assertion of a cause of action, for 'a balance due on any specialty, note or agreement, for money or specific articles, or for goods, wares and merchandise sold and delivered, or for work and labor done.' It might have been for rent due, for money advanced, money received to the use of the plaintiff, and even for money claimed by the plaintiff as due *ex debito*, and charged in the books of the intestate. It is obvious that the magistrate had no authority to take cognizance of these cases, and of others, which might be stated; and since his jurisdiction was strictly *special* and *limited*, it is essential to the validity of his judgment, and of the proceedings under it, that the record should show that he acted upon a case which the law submitted to his jurisdiction."

Walker vs. Turner, 9 Wheaton, 548-9.

"In summary proceedings, where a court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction ought to appear on the face of the record. Otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non judice*."

Thatcher vs. Powell, 6 Wheaton, 119

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Oct. 8, 1920.